80-632

No.

Supreme Court, U.S.
FILED
OCT 18 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

HARVEY GOLDEN, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, DURING THE PERIOD MAY 27, 1974, THROUGH JANUARY 9, 1975, APPLICATION OF 42 USC § 1396h(b)(1) WAS LIMITED TO ONE WHO BOTH (1) FURNISHED ITEMS OR SERVICES TO AN INDIVIDUAL WHICH WERE COMPENSABLE UNDER 42 USC § 1396 *et seq.*, AND (2) SOLICITED, OFFERED, OR RECEIVED ANY KICKBACK IN CONNECTION WITH HIS OR HER FURNISHING OF SUCH SERVICES TO SUCH INDIVIDUAL?

II. WHETHER COUNTS 11 THROUGH 15 OF THE AMENDED FOLLOW UP INFORMATION FAIL TO ALLEGE THAT PETITIONER FURNISHED ITEMS OR SERVICES TO ANY INDIVIDUAL WHICH WERE COMPENSABLE UNDER 42 USC § 1396 *et seq.* IN CONNECTION WITH WHICH HE ALLEGEDLY RECEIVED THE PAYMENTS SET FORTH IN SAID COUNTS, AND THUS FAIL TO CHARGE AN ESSENTIAL ELEMENT OF A VIOLATION OF 42 USC § 1396h(b)(1)?

   A. WHETHER THE AMENDED FOLLOW UP INFORMATION ALLEGED AND DEFENDANT'S PLEA OF GUILTY ESTABLISHED THAT *PETITIONER FURNISHED LABORATORY TESTING SERVICES TO ANY INDIVIDUAL* WHICH WERE COMPENSABLE UNDER 42 USC § 1396 *et seq.*

   B. WHETHER THE AMENDED FOLLOW UP INFORMATION ALLEGED AND DEFENDANT'S PLEA OF GUILTY ESTABLISHED THAT *PETITIONER FURNISHED TO ANY INDIVIDUAL PHYSICIAN'S SERVICES* AS

DEFINED BY 42 USC § 1396(d)(5) AND 42 USC § 1395(x)(r)(1) WHICH WERE COMPENSABLE UNDER 42 USC § 1396 *et seq*.

C. WHETHER THE AMENDED FOLLOW UP INFORMATION ALLEGED AND DEFENDANT'S PLEA OF GUILTY ESTABLISHED THAT *PETITIONER FURNISHED TO ANY INDIVIDUAL ANY SERVICES* WHICH WERE COMPENSABLE UNDER 42 USC § 1396 *et seq*.

III. WHETHER THE ALLEGED PAYMENTS TO PETITIONER AS SET FORTH IN COUNTS 11 THROUGH 15 OF THE AMENDED FOLLOW UP INFORMATION WERE *KICKBACKS* AS THAT TERM IS USED IN 42 USC § 1396(h)(b)(1) OR *REBATES* AS THAT TERM IS USED IN 42 USC § 1396(h)(b)(2)?

A. DID THE COURT OF APPEALS COMMIT ERROR IN REFUSING TO GRANT A REHEARING FOR THE PURPOSES OF DETERMINING WHETHER:

1. CONGRESS INTENDED TO DIFFERENTIATE BETWEEN KICKBACKS AND REBATES IN ENACTING 42 USC §§ 1396(h)(b)(1) and 1396(h)(b)(2)?

2. THE PAYMENTS ALLEGEDLY RECEIVED BY PETITIONER WERE KICKBACKS AS THAT TERM IS USED IN 42 USC § 1396(h)(b)(1) OR REBATES AS THAT TERM IS USED IN 42 USC § 1396(h)(b)(2)?

3. ANY PAYMENTS ALLEGEDLY RECEIVED BY PETITIONER WERE *PERCENTAGE PAYMENTS* AND, THUS, KICKBACKS WITHIN THE DEFINITION SET FORTH

IN *U.S.* v *HANCOCK*, 604 F.2d 999 (7th Cir. 1978)?

IV. WHETHER DURING THE PERIOD MAY 27, 1974, THROUGH JANUARY 9, 1975, 42 USC § 1396(h)(b)(1) WAS APPLICABLE TO ONE WHO REFERRED LABORATORY BUSINESS TO A MEDICAL TESTING LABORATORY, BUT WHERE THE PARTY REFERRING SUCH BUSINESS DID NOT PERFORM THE LABORATORY TESTS AND WHERE THE REFERRING OF SUCH BUSINESS WAS NOT A SERVICE WHICH WAS COMPENSABLE UNDER 42 USC § 1396 *et seq*.

V. WHETHER APPLICATION OF THE PROVISION OF 42 USC § 1396(h)(b)(1) AS IT WAS FRAMED DURING THE PERIOD MAY 27, 1974, THROUGH JANUARY 9, 1975, WOULD RESULT IN A DENIAL OF DUE PROCESS TO APPELLANT FOR THE REASON THAT SUCH STATUTE WAS VAGUE AND INDEFINITE AND DID NOT GIVE FAIR WARNING THAT IT WAS APPLICABLE TO THE RECEIPT OF PAYMENTS BY A DOCTOR IN RETURN FOR REFERRING LABORATORY BUSINESS TO A MEDICAL TESTING LABORATORY WHERE THE MEDICAL TESTING SERVICES WITH REGARD TO SUCH REFERRED BUSINESS WERE ALL PERFORMED BY THE MEDICAL TESTING LABORATORY AND NOT BY THE REFERRING DOCTOR?

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OPINIONS BELOW

The decision of the Court of Appeals, Nos. 79-5222-24, 79-5269-70, June 16, 1980, not yet reported, appears in the Appendix hereto. On August 19, 1980, the Court of Appeals entered its Order denying Petitioner Golden's Motion for Rehearing. A copy of that Order appears in the Appendix hereto. The District Court issued an Opinion and Order denying Defendant Golden's Motion to Dismiss Indictment and Motion to Dismiss Information on March 16, 1979. Counsel does not know if such Opinion and Order was published and a copy thereof appears in the Appendix hereto. The District Court also issued an Opinion and Order denying Defendant's Motion for Rehearing which is reported at 468 F. Supp. 410 (E.D. Mich. 1979).[1]

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 16, 1980. A timely petition for rehearing was denied on August 19, 1980, and this Petition for Certiorari was filed within sixty (60) days of that date pursuant to Rules 20.1 and 20.4. This Court's jurisdiction is invoked under Title 28, United States Code, § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 USC § 1396h(b)(1) provides in pertinent part:

> (b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in

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[1] Defendants-Appellants below were Richard Tapert, Harvey Golden, Gerald Weingarden, Donald Freedlander, and Robert Gash.

part out of Federal funds under a State plan approved under this subchapter and who solicits, offers or receives any

(1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, or

(2) rebate of any fee or charge for referring any such individual for the furnishing of such items or services.

42 USC § 1395x(b)(3) provides:

(b) The term 'inpatient hospital services' means the following items and services furnished to an inpatient of a hospital and (except as provided in paragraph (3)) by the hospital— . . .

(3) such other diagnostic or therapeutic items or services, furnished by the hospital or by others under arrangements with them made by the hospital, as are ordinarily furnished to inpatients either by such hospital or by others under such arrangements;

42 USC § 1396d(a)(1) provides in pertinent part:

For purposes of this subchapter—

(a) The term 'medical assistance' means

* * * *

(1) inpatient hospital services (other than services in an institution for tuberculosis or mental diseases);

42 USC § 1396d(a)(3) provides in pertinent part:

For purposes of this subchapter—

(a) The term 'medical assistance' means

* * * *

(3) other laboratory and X-ray services;

42 USC § 1396d(a)(5) provides in pertinent part:

For purposes of this subchapter—
(a) The term 'medical assistance' means

* * * *

(5) physicians' services furnished by a physician (as defined in section 1395x(r)(1) of this title), whether furnished in the office, the patient's home, a hospital, or a skilled nursing facility, or elsewhere;

MCL § 325.81(1)(b) provides in pertinent part:

Sec. 1. As used in this act:

* * * *

(b) 'Clinical Laboratory' means a facility which may be patronized by any physician, health officer or other person authorized by law for the purpose of obtaining information for the diagnosis, prevention or treatment of disease or the assessment of medical condition by the microbiological, serological, histological, hemotological, immunohematological, biophysical, cytological, pathological or biochemical examination of materials derived from the human body, except as provided in section 2.

MCL § 325.82(2)(a) provides in pertinent part:

Sec. 2. (1) This act does not apply to:

(a) A laboratory operated by a person licensed or registered to practice medicine, osteopathy, dentistry or podiatry who performs laboratory tests or procedures, personally or through his employees,

solely as an adjunct to the treatment of his own patients.

CFR Title 20, Chapter III, Part 405, Sub-part M, § 1316(g)(4) states:

> (g) Standard; laboratory report and record. The laboratory report is sent promptly to the licensed physician or other authorized person who requested the test and a suitable record of each test result is preserved by the laboratory for a period of at least 2 years after the date of submittal of the report or for a period of time required by State law for such records, whichever is longer. The factors explaining the standard are as follows:
>
> * * * *
>
> (4) The results of laboratory tests or procedures or transcripts thereof are not sent to the patient concerned except with the written consent of the physician or other authorized person who requested the test.

Regulations 405.1310 of Sub-part or Part 405 of Chapter III of Title 20 of the Code of Federal Regulations as published on September 19, 1974, provides in pertinent part:

> . . . Services furnished by out-of-hospital laboratories under the direction of a physician, such as a pathologist, are considered to be subject to the conditions where the physician holds himself and the facilities of his office out to other physicians as being available for the performance of diagnostic tests. A laboratory maintained by a physician for performing diagnostic tests for his own patients is exempt from the conditions unless such laboratory accepts at least 100 specimens in any category during any

calendar year diagnostic tests on referral from other physicians. . . .

Michigan Administrative Code R325.2353(1) and (2) provides:

> Rule 53. (1) The original or duplicate report shall be preserved for at least 1 year and shall be accessible to the authorized individual inspecting the laboratory.
>
> (2) The results of laboratory tests or procedures or copies thereof shall not be given or sent to the patient concerned except with the written consent of the physician or other authorized person who requested the test.

STATEMENT

On or about September 21, 1978, Harvey O. Golden, Defendant-Petitioner (hereinafter referred to as Petitioner) was named as a Defendant in Counts 1 through 25 of a 37 Count indictment handed down by a United States Grand Jury. Count I of the indictment alleged a conspiracy in violation of 18 USC § 1962(d), Counts 2 and 3 of the indictment alleged substantive violations of the provisions of 18 USC §1962(b) and § 1962(c) and Counts 4 through 24 of the indictment each alleged individual mail fraud offenses in violation of 19 USC § 1341. All of the charges in the indictment related to payments allegedly received by Petitioner in return for referring Medicare and Medicaid laboratory business to Titan Laboratory. On or about February 2, 1979, the United States Attorney filed a Follow-Up Information additionally charging Petitioner in Counts 11 through 16 with six violations of the provisions of 42 USC § 1396h(b)(1) as such statute was in effect during the period May 27, 1974, through January 9,

1975. On March 9, 1979, oral argument was had before the District Court upon Defendant Golden's Motion to Dismiss the Indictment and Information. During oral argument on March 9, 1979, counsel for the government admitted that the language of the Information referred to services performed by the laboratory. App. p. 3a. Government counsel also stated that the Information only covered § 1396h(b)(1) and not § 1396h(b)(2). App. p. 4a. On March 16, 1979, the District Court entered its Opinion and Order denying said Motion. On March 21, 1979, the United States Court of Appeals for the Fifth Circuit issued its decision in *United States* v *Porter*, 591 F2d 1048 (5th Cir. 1979). Relying on this case, counsel for Defendant orally moved for a rehearing of the Motion to Dismiss. On March 29, 1979, the District Court permitted argument upon such Motion for Rehearing in view of *Porter, supra*. On April 5, 1979, the District Court entered its Opinion and Order denying Defendant's Motion for Rehearing. On April 10, 1979, Defendant-Petitioner Harvey O. Golden entered a plea of guilty to Counts 11 through 15 of the Follow-Up Information as amended. Count 16 of the Information and all of the Counts of the indictment against Petitioner were dismissed upon Motion of the government at the time that Petitioner entered his guilty plea. Prior to the entry of Petitioner's guilty plea it had been orally stipulated between counsel for Petitioner and Assistant United States Attorney, Peter Rosen, that the Follow-Up Information would be amended by the government. An Order granting the government's Motion to Amend Follow-Up Information was filed with the Court by the government on August 9, 1979. Petitioner was aware of, and had stipulated to, the amendatory language added to the Information at the time that he pled guilty. The Amended Follow-Up Information did not state that Petitioner performed or furnished any services compensable under 42 USC § 1396 *et seq*. to any individual. Rather, it charged that Petitioner obtained services. At Petitioner's

plea hearing, the Court advised him that the government would have to prove that he *obtained services* from Titan Laboratories which were compensable under Title 19 (42 USC § 1396 *et seq.*). App. p. 3b. *The Court did not advise Petitioner that the Government would have to prove that he furnished any services.*

Prior to pleading guilty Petitioner had advised Assistant United States Attorney, Peter Rosen, that he intended to appeal his guilty plea. Petitioner Golden's desire to appeal was communicated to the District Court as early as the date upon which Petitioner entered his plea of guilty and was acknowledged by the Court at the sentencing on June 7, 1979. Petitioner was released on personal bond pending appeal. On April 26, 1979, Petitioner Golden filed a Motion for Arrest of Judgment pursuant to Rule 34 of the *Federal Rules of Criminal Procedure* in order that he might be able to appeal jurisdictional defects following his plea of guilty. Petitioner's Motion for Arrest of Judgment was denied by the District Court on May 1, 1979. On June 16, 1980, the United States Court of Appeals for the Sixth Circuit affirmed the decisions of the District Court, relying upon *United States* v *Hancock*, 604 F. 2d 699 (7th Circuit 1978) and refusing to follow *United States* v *Porter*, 591 F. 2d 1048 (5th Cir. 1979). On August 18, 1980, the Court of Appeals denied Petitioner's Motion for En Banc Rehearing.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

QUESTION I & IV

Petitioner has argued below that the criminal conduct prohibited by 42 USC § 1396(h)(b)(1) consists of the following elements:

1. Defendant must be someone who has furnished items or services to an individual.
2. The items or services furnished by Defendant must have been compensable under 42 USC § 1396, et seq.
3. Defendant must have solicited, offered, or received a "kickback" in connection with his or her furnishing of such services.

The statute is not, on its face, applicable to one who has not furnished services or items compensable under § 1396, *et seq*. It is additionally clear from the face of the statute that the "kickbacks" received must be in connection with compensable services furnished by the kickback recipient and not in connection with compensable services or items furnished by another party. This follows from the fact that the phrase "with the furnishing of *such* items or services" as used in subparagraph (1) refers back to the same items or services mentioned in paragraph (b) which must have been furnished by the Defendant. The focus of criminal charges brought under the statute must, thus, be upon relevant items or services furnished by the Defendant. If the payments alleged to be kickbacks were not solicited, offered, or received in connection with compensable items or services furnished by Defendant, then the statute is not applicable. Nor, is the statute applicable if the alleged payments were not "kickbacks," but, rather, "rebates," as that term is used in § 1396(h)(b)(2). Petitioner has argued below, and urges upon this Court, that the relevant services in the instant case were the laboratory testing services performed by Titan Laboratories, and that such services were not "furnished" by Petitioner. Petitioner has also argued below that the referring of laboratory business by Petitioner to Titan Laboratories was not a service compensable under § 1396, *et seq*., and, thus, was not a service contemplated under § 1396(h)(b)(1).

When one examines the internal structure of the Medicare and Medicaid statutes, 42 USC § 1395, *et seq.* and § 1396, *et seq.*, it is discovered that the statute itself seems to equate the "furnishing" of laboratory services with the performance of such services. Laboratory services are specifically distinguished from physician's services under the Medicaid statutes relevant to the instant cause. Compare 42 USC § 1396(d)(a)(3) and (5). Inpatient hospital services are also covered under 42 USC § 1396(d)(a)(1). The definition of inpatient hospital services is set fort[1]. in 42 USC § 1395(x)(b)(3). That section provides as follows:

> The term 'inpatient hospital services' means the following items and services furnished to an inpatient of a hospital *and (except as provided in paragraph (3)) by the hospital* —
>
> 3. Such other diagnostic of therapeutic items or services, *furnished* by the hospital or *by others under arrangements with them made by the hospital, as are ordinarily furnished* to inpatients either *by such hospital or by others under such arrangements*;

Laboratory testing services are diagnostic in nature. Thus, it can be seen that the very structure of the Medicare and Medicaid Acts definitionally equates the "furnishing" of laboratory services with the performing of such services. Inpatient hospital services under § 1395(x)(b)(3) include those generally "*furnished*":

1. To inpatients;
2. Of a hospital;
3. By a hospital.

Except, however, they also include those "furnished":

1. To inpatients;
2. Of a hospital;
3. *By others under arrangements with the hospital.*

It is thus clear that the word furnished in the context of inpatient hospital services is used by the statute in a manner which clearly demonstrates that the term furnished is synonymous with the term performed. When the hospital performs the tests it "furnishes" them to the inpatients. When an outside lab performs the tests they are statutorily defined as having been "furnished" by the laboratory. Petitioner submits that neither the internal construction of the Medicare or Medicaid statutes or the legislative history contains any suggestion that the term furnished is to have any different meaning when used in conjunction with laboratory services performed by an independent testing laboratory upon referral by or arrangement with a physician than it is to have when used in conjunction with the same type of services performed by an independent laboratory under an arrangement with a hospital. The term "furnished" is used nc differently in 42 USC § 1396(h)(b)(1) than it is in 42 USC § 1395(x)(b)(3). If the opposite were true and in the absence of a differing statutory definition under § 1396(h)(b)(1), § 1396(h)(b)(1) would offend the doctrine of lenity and be vague and confusing and in violation of the Fifth Amendment right to due process. In short, if laboratory testing business is referred to an independent laboratory by a physician and the independent laboratory performs the analysis, then such analysis service is furnished by the laboratory and not by the physician. Such interpretation is internally consistent with other sections of the Act and is mandated if the statute is to be held constitutional.

It must be noted that the majority opinion of the Court of Appeals disposed of Issues I and IV as set forth in this Petition for Writ of Certiorari summarily. The Court stated:

> Appellants contend that they did not 'furnish' the services in connection with which they received payments . . . These and all other contentions made by Appellants have been considered and found to be without merit. App. p. 20c.

Circuit Judge Jones, concurring, however, did deal with the question of whether the laboratory services were "furnished" by Appellant and held as follows:

> It is fair to say that physicians in Michigan in 1976-1977 furnished the laboratory services to their patients. The physicians took the specimens and sent them to a laboratory. App. p. 22c.

Judge Jones then held that the statute is satisfied if there is a logical relationship between the alleged kickbacks and the services for which Federal funds were paid. It appears that Judge Jones' conclusion is based upon his premise that:

> . . . physicians in Michigan in 1976-1977 furnished the laboratory services to their patients. The physicians took the specimens and sent them to a laboratory. A laboratory could act only on orders from the physicians. Mich. Comp. Laws Ann. §§ 325.81(b), 325.89(b), repealed by Mich. Comp. Laws. Ann. § 333.20501 *et seq*. (1978); cf. 42 C.F.R. § 405.1316(e) (Medicare Regulations). The laboratory could report the test results only to the physicians, unless they instructed otherwise. Mich. Adm. Code R. 325.2353(2) (Rule 53); cf. 42 C.F.R. § 405.1216(g) (Medicare Regulations). The physicians bore the responsibility of interpreting the test data. In short, the physicians did everything but

> actually perform the clinical tests. Under these circumstances by interpreting the word 'furnish' according to its common usage to mean 'supply or provide,' I would hold that the physicians did 'furnish' the laboratory services. App. p. 22c.

In so holding Judge Jones either ignored or did not understand the use of the term "furnished" in 42 USC § 1395(x)(b)(3), where such term is clearly employed as a synonym for performed. See e.g. 42 USC §§ 1395k(a)(b), 1395n(b)(1), and 1395x(h)(3). Significantly the same considerations cited by Judge Jones in support of his conclusion that the Appellant "furnished" the laboratory service in the instant case apply equally to laboratory tests "furnished . . . by others under arrangements with them made by the hospital . . ." as enunciated in § 1395x(b)(3). In the hospital situation hospital staff members take the specimens and send them to the laboratory. Results are likewise reportable to the hospital or a doctor and must be interpreted by a doctor. Nevertheless, even in such context the statute refers to the diagnostic testing services as having been "furnished" by such other i.e. the outside laboratory. C.f. *United States of America For the Use and Benefit of Floating Floors, Inc.* v *Federal Insurance Company*, 381 F. 2d 361 (9th Cir. 1967) in which the Ninth Circuit held that the placing of an order for goods did not constitute the "furnishing" of those goods for the purpose of The Miller Act.

Under Judge Jones' construction the term "furnishes" would have a broader meaning under § 1396(h)(b)(1) than it would under other sections of the act. Such constitutional inconsistency is contrary to the notion that criminal statutes are to be strictly construed in favor of the accused. *U.S.* v *Boston & Maine Railroad*, 380 US 157 (1965); *Toussie* v *U.S.*, 397 US 112 (1970); *U.S.* v *Monasterski*, 567 F. 2d 677 (6th Cir. 1977). Judge Jones' comments indicate, moreover, that he was talk-

ing about physicians generally and not about the facts of this specific case as disclosed by the record.

While Judge Jones seems to have erroneously accepted the concept that the relevant compensable services furnished in the instant case by Petitioner were the laboratory services, the majority did not address itself to the statutory construction issue. Thus, we do not know what compensable services the majority concluded were *furnished* by Petitioner. This silence exacerbates the failure of the Amended Follow-Up Information to specify which services were furnished by Petitioner. This Court can only speculate as to whether the majority accepted Judge Jones' rationale or, on the other hand, premised its decision on the "informal amendment" argument advanced by the government and which was roundly chastised by Judge Jones at Fn. 1. If the former, then the entire panel has construed the term "furnishes" in § 1396h(b)(1) in a manner which is inconsistent with and broader than the use of the same term in §§ 1395x(b)(3), 1395k(a)(b), 1395n(b)(1), and 1395x(h)(3). Such inconsistent and broader construction offends the doctrine of lenity. *U.S.* v *Boston & Maine Railroad, supra*. It does violence to the presumption that where the same word is used in different parts of the same act it is intended to have the same meaning, wherever used in such act. *C.I.R.* v *Ridgeway's Estate*, 291 F 2d 257 (3d Cir. 1961), *Hotel Equities Corp.* v *C.I.R.*, 546 F 2d 725 (7th Cir. 1976), *Atlantic Cleaners and Dryers, Inc.* v *U.S.*, 286 U.S. 427 (1932). If, on the other hand, the majority opinion reflects acceptance of the government's "informal amendment" argument then, as discussed below, serious Fifth and Sixth Amendment problems are present in this case.

No question exists in this case as to who performed the laboratory testing services. Certiorari should be granted in this case for the purpose of determining whether the term "furnishes" as used in 42 USC §§ 1395nn(b)(1) and

1396h(b)(1) is to be interpreted narrowly as used in e.g. §§ 1395x(b)(3), 1395k(a)(b), 1395n(b)(1), and 1395x(h)(3) to refer only to the party actually performing such services. Moreover, the failure of the majority, below, to rule upon such issues results in a serious issue as to what service the majority found was, in fact, furnished by Petitioner. The only way that these questions can be answered is for this Court to issue the Writ of Certiorari prayed for by Petitioner.

QUESTION II

Regardless of whether this Court accepts Petitioner's contention that the laboratory services performed by Titan Laboratories were the relevant services contemplated by 42 USC § 1396(h)(b)(1) *and that Petitioner did not furnish such services*, nevertheless, it cannot be doubted that § 1396(h)(b)(1) is only applicable to someone who does furnish to another individual some type of services which are compensable under § 1396, *et seq*. That being the case, it is axiomatic that charges brought under § 1396(h)(b)(1) must specifically allege that a Defendant furnished to an individual services which were compensable under § 1396, *et seq*. Any failure to so allege constitutes the omission of an element of the crime charged. Petitioner submits that Counts 11 through 16 of the Amended Follow-Up Information in this cause failed to allege:

1. That Petitioner furnished any laboratory testing services to any individual which were compensable under 42 USC § 1396, *et seq.;*
2. That Petitioner furnished any physicians' services to any individual which were compensable under 42 USC § 1396, *et seq.;* and,

3. That Petitioner furnished any services of any nature to any individual that were compensable under 42 USC § 1396, *et seq*.

Rather than focusing upon any services *furnished* by Petitioner to any individual, the Amended Follow-Up Information focused upon the laboratory services performed by Titan Laboratories and *obtained* by Petitioner from Titan. The Information does not charge that Petitioner "furnished" such services to anyone only that he obtained them. While the Information does speak in terms of Petitioner having received monetary payments from Titan Laboratories "in exchange for referring his laboratory work to Titan Laboratories, Inc.," nevertheless, the referral of laboratory business was not a service which was compensable under 42 USC § 1396, *et seq*.

Significantly, the Assistant United States Attorney attempted to argue before the Court of Appeals that the government had informally amended the Amended Follow-Up Information by virtue of certain comments he made at the District Court level during oral argument upon Petitioner's Motion to Dismiss. *Specifically, the Assistant United States Attorney had argued that while the language of the Information referred to services performed by the laboratory, nevertheless, it was the government's position that a doctor, himself, furnishes services to an individual whenever he treats that individual and whenever he sends that individual's blood or other specimens for testing*. App. p. 3a. *No language in the Amended Follow-Up Information, however, referred to treatment of individuals by Petitioner*. The following interchange took place between the District Court Judge and the Assistant United States Attorney upon argument of Petitioner's Motion to Dismiss.

THE COURT: And do I understand then that the government's position is that the services, I am trying to

understand, the services rendered by the doctor are the taking of the blood, for example.

MR. PARKER: The taking of what?

THE COURT: The taking of the blood.

MR. PARKER: Of the treating of the patient, one, and also the sending of the blood to the laboratory, both of those, I think, constitutes services to an individual. Perhaps, sending the blood is part of the component part of the total treatment of the individual, but I think that a doctor's examination of the patient constitutes services under the misdemeanor statute. App. p. 4a.

Judge Jones in Fn. 1 of his concurring Opinion chastised the government for its zealous advancement of the theory that the Amended Follow-Up Information had been informally amended by virtue of such oral argument. The government moved before the Court of Appeals to strike such comments by Judge Jones, App. p. 1d, but such Motion was denied. App. p. 1e.

The crucial point is that the government's own argument regarding the nature of the services "furnished" to individuals by Petitioner is at odds with the government's own admission that *the services focused upon by the Amended Follow-Up Information are the laboratory services*. If the government meant to charge that the services furnished by Petitioner were those of treating the patient and sending blood and specimens to the laboratory, then it is apparent that the Information is fatally defective in that regard, since it does not even refer to such services and since the referral of specimens is not a service compensable under § 1396 *et seq*. Quite simply put, the Information failed to advise Petitioner of the nature of the services that he was charged with furnishing to individuals.

Inseparable from the question of whether the Amended Follow-Up Information charged Petitioner with furnishing

any services as required by § 1396(h)(b)(1), is the question of whether Petitioner actually pled guilty to that critical element. At the time of Petitioner's plea, the District Court Judge did not inquire of Petitioner whether he treated any patients, drew any specimen samples, or furnished any other item of service compensable under 42 USC § 1396, *et seq.* to any individual. Nor, did Petitioner at his plea hearing state or indicate that he did furnish any such services. Petitioner was not advised by the Court that the government would have to prove that he did furnish any such services. Indeed, the District Court, buttressing Petitioner's argument that the Amended Follow-Up Information did not charge that he *furnished* any services compensable under § 1396 *et seq.* advised Petitioner as follows:

> THE COURT: Now, do you understand that in order to prove you guilty of those counts, the government would have to prove beyond a reasonable doubt that on or about the dates listed below that you *obtained services from Titan Laboratories for* which payment was to be made in part out of Federal funds under a State plan approved under the Social Security Act, Title 19, do you understand that?
>
> DEFENDANT GOLDEN: Yes.
>
> THE COURT: In that you solicited and/or received payments from Titan Laboratories, Inc., and Media Technology is detailed in the specific counts, some from Titan and some from Media?
>
> DEFENDANT GOLDEN: Yes, your Honor.
>
> THE COURT: I guess one is from Media and the balance from Titan. And, *it would have to prove that you received these payments knowingly and willfully. Do you understand that?*
>
> DEFENDANT GOLDEN: Yes.

THE COURT: *And that you received them because you had — in order to prove you guilty that you received them because you had in fact referred this business to Titan Laboratories,* do you understand?

DEFENDANT GOLDEN: Yes, your Honor. App. p. 3b.

The Court simply never asked Petitioner whether he had furnished any services to any patients, nor did it advise him that to prove him guilty as charged in the Information, the government would have to prove beyond a reasonable doubt that he did furnish services to an individual. The Court simply advised Petitioner that in order to find him guilty the government would have to prove that he had knowingly received payments for referring laboratory business to Titan. Such advice by the Court was consistent with the language of the Amended Follow-Up Information to the effect that Petitioner obtained services from Titan and received payment for referring business to Titan, but fails to focus upon or advise Petitioner that the government would have to prove that he *furnished* laboratory or any other compensable services to any other individual.

That an indictment or Information must allege every element of a crime sought to be charged is axiomatic. *Russell* v *United States*, 369 US 749 (1962). The failure of an indictment or Information to allege all of the elements of the crime charged is violative of Rule 7(c) of the Federal Rules of Criminal Procedure and the basic Sixth Amendment requirement that an accused must be apprised of the nature of the accusation against him. He must be sufficiently apprised of the charges which he must meet and the indictment or Information must be sufficiently specific to enable him to plead double jeopardy in case any other proceedings are subsequently commenced against him based upon the same facts. *Russell* v *United States, supra.*

An important corollary purpose to be served by the requirement that an indictment or Information set out each and every element of the crime charged is to inform the Court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction if one should be had. *Russell* v *United States, supra*. As noted by the Court in *Russell*:

> A cryptic form of indictment in cases of this kind requires the Defendant to go to trial with a chief issue undefined. It enables his conviction to rest on one point and the averments of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion before now to condemn just such a practice in a quite different factual setting. *Cole* v *Arkansas*, 333 US 196, 201, 202, 92 L Ed 644, 647, 648, 68 S Ct 514. *Russell* v *United States, supra*, at 766.

Petitioner submits that the holding and rationale of the United States Supreme Court in *Russell* is applicable to the instant cause. The Amended Follow-Up Information did not charge, generally, that Petitioner furnished any services to any individual which were compensable under 42 USC § 1396, et seq. Nor, did it charge that he furnished any *specific* services to any individual which were compensable under § 1396, et seq. The only services spoken of by the Information are those performed by the laboratory and obtained by Petitioner. The District Court's advice to Petitioner at his plea hearing was worded in the form of an Information which was insufficient to support a conviction.

Nevertheless, the government has, through its "Informational Amendment" argument shifted its theories at various stages of this proceeding as regards the services furnished by Petitioner. The government did not argue or state *at Peti-*

tioner's plea hearing the relevant services "furnished" by him were "physician's services" as defined by 42 USC § 1395x(r). Nor did the Information charge that he "furnished" laboratory testing services as found by Judge Jones below. Nor did the Court so advise Petitioner.

The failure of the Trial Court to question Petitioner as to the nature of the services furnished by him, or to advise him that the government had the burden of proving beyond a reasonable doubt that he furnished laboratory or physician's services which were compensable under 42 USC § 1396, et seq., when combined with the Court's positive assertion that the government would have to prove beyond a reasonble doubt that he *obtained* services, well illustrates the confusion generated by the deficiencies of the Amended Follow-Up Information. The majority opinion of the Court of Appeals treats Petitioner's challenge to the sufficiency of the indictment in a summary manner. The Court stated:

> Appellants contend that they did not 'furnish' the services in connection with which they received payments, *and that the Information does not charge an offense*. These and all other contentions made by Appellants have been considered and found to be without merit. *United States* v *Tappert, et al*, App. p. 20c.

From that statement by the Court of Appeals it is impossible to determine whether the majority adopted the United States Attorney's argument as chastised by Judge Jones, that he had informally amended the Information to charge that the services furnished by Petitioner, within the meaning of § 1396h (b)(1), were those of treating his patients and sending specimens to the laboratory, or, on the other hand, whether it adopted Judge Jones' concurring rationale to the effect that the Information charged that Petitioner "furnished" to his patients the laboratory services which the Amended Follow-

Up Information charges that he "obtained" from Titan Laboratories. The crucial fact is that the Information itself does not charge that Petitioner furnished any compensable services to anyone nor did the District Court's comments to Petitioner, based as they were upon the language of the Amended Follow-Up Information, so advise Petitioner. The District Court's comments to Petitioner upon his plea were thus based strictly upon the language of the Amended Follow-Up Information and did not reach the critical element of what services were charged as having been *furnished* by Petitioner. The critical relationship between sufficiency of charges and plea acceptance is thus exposed. Petitioner was advised by the District Court of what was charged. That charge did not include the critical element of specifically what compensable Medicaid services were furnished by Petitioner. Petitioner, thus, upon the basis of the District Court's explanation of the nature of the crime charged, pled guilty to that which was specifically set forth in the Amended Follow-Up Information, as it was explained to him by the Court. *Neither the Amended Follow-Up Information nor the Court's comments* based thereon advised Petitioner of the services he was accused of "furnishing". Accordingly, Petitioner has not been advised of the nature of his alleged offense. The failure to so advise is in violation of Rule 7(c) of the Federal Rules of Criminal Procedure and of Petitioner's Fifth and Sixth Amendment rights to due process and notice of the charges against him.

The above defects were ignored, without meaningful comment by the majority of the Court of Appeals. Judge Jones concurring, while chastising the government for its "fast and loose" play "with the established rules of *criminal procedure* and principles of due process", as regards its argument that it informally amended the Information to charge that the relevant services furnished by Petitioner were treatment and referral services, nevertheless, overlooked the fact that the

Amended Follow-Up Information did not charge that Petitioner "furnished" laboratory services. It only charged that he "obtained" such services, and that is all Petitioner was advised by the District Court that the government would have to prove when he entered his plea. The Information to which Petitioner pled guilty was, thus, insufficient to advise the District Court of the essential elements of the crime charged against which the District Court could guage the sufficiency of Petitioner's plea. Judge Jones assumed, that the Amended Follow-Up Information advised Petitioner that he was accused of furnishing the laboratory testing services, but did not rationally discuss the question of whether the language of that document so advised Petitioner.

Petitioner submits that he has never been sufficiently advised or notified of the services which he is accused of having furnished within the meaning of 42 USC § 1396h(b)(1). As a result his plea of guilty is not sufficient to sustain conviction under § 1396h(b)(1). This Court should grant Certiorari in this cause in order to determine whether Petitioner has been sufficiently advised of the charges against him as required by *Russell* v *U.S., supra.*

QUESTION III

On or about September 29, 1980, a Petition For Writ of Certiorari was filed with this Court by Gerald Weingarden, D.O. Dr. Weingarden was charged with and pled guilty to five counts of violating 42 USC § 1396h(b)(1). Those charges were contained in the same Amended Follow-Up Information as the charges against Petitioner Golden. Petitioner Golden does hereby adopt and incorporate by reference herein those reasons for granting Certiorari advanced by Petitioner Weingarden in his Petition For Writ of Certiorari.

As previously noted, Petitioner Golden's Motion For En Banc Rehearing was denied by the Court of Appeals by Order dated August 19, 1980. In that Motion for Rehearing Petitioner Golden raised issues relating to the term "rebate" as used in § 1396h(b)(1) and the phrase "percentage payments" as that phrase is used in *US* v *Hancock*, 604 F 2d 999 (7th Cir. 1978). Petitioner submits that the failure of the Court of Appeals to grant rehearing for the purpose of resolving the aforesaid issues is reason for this Court to grant Certiorari in this cause.

It must be noted that 42 USC § 1396h(b)(2), unlike § 1396h(b)(1), speaks in terms of *rebates* of fees or charges for the referral of Medicaid business. The record in this cause makes it clear that Petitioner was prosecuted as a result of conduct alleged to consist of the referral of Medicaid business to a testing laboratory in return for certain payments made to him.

If Congress intended the term "kickback" as used in 42 USC § 1396h(b)(1) to have the same meaning as the term rebate as used in § 1396h(b)(2), then Petitioner submits that the prohibition of § 1396h(b)(2) would be completely encompassed within the terms of § 1396h(b)(1). As such, § 1396h(b)(2) would be superfluous and unnecessary. There is a presumption, however, against interpreting a statute in a way which would render portions of the statute ineffective, unnecessary, or meaningless and Courts should not support that Congress intended to enact unnecessary statutes or attribute futile acts to Congress. *FTC* v *Manager, Retail Credit Co., Miami Branch Office*, 515 F 2d 988 (D.C. Cir. 1975); *Jackson* v *Kelly*, 557 F 2d 735 (10th Cir. 1977); *General Motors Acceptance Corp.* v *Whisnant*, 387 F 2d 744 (5th Cir. 1968); *US* v *Blasius*, 397 F 2d 203 (2d Cir. 1968); *Uptagrafft* v *US*, 315 F 2d 200 (4th Cir. 1963); *Continental Illinois National Bank & Trust Co. of Chicago* v *US*, 403 F 2d 721 (Ct. Cl. 1968). Every

part of a statute must be viewed in connection with the whole so as to harmonize all parts, if practicable, and give sensible and intelligent effect to each. *General Motors Acceptance Corp.* v *Whisnant, supra*. The use of surplussage is not ordinarily to be attributed to Congress. *US* v *Naughten*, 195 F Supp 157 (D.C. Cal. 1961).

At the time that 42 USC § 1396 was enacted, the term "rebate" was well known to American jurisprudence. In *El Dorado Oil Works, et al* v *US, et al*, 328 US 12 (1946), the Court dealt with the question of rebates prohibited by the Elkins Act, 49 USC § 41. In *El Dorado*, the Appellant, *El Dorado Oil Works*, processed, sold, and shipped coconut oil in interstate commerce. For such purpose it leased special tank cars from General American Tank Car Corporation. The rental agreement provided for a specific monthly amount to be paid by El Dorado to lessor as rent for each car. When the railroad utilized such cars the railroad paid a certain tariff for the use of such cars to lessor. Under the agreement between lessor and lessee, lessor, in turn, was to pay over to lessee the mileage tariffs paid by the railroad. The Interstate Commerce Commission had found that El Dorado was entitled to receive a just and reasonable allowance out of the mileage tariffs for the cost incurred by it in furnishing the cars, namely an amount equal to the monthly car rental that El Dorado was required to pay to lessor. The Court further held, however, that El Dorado could not receive any portion of the mileage tariffs received by lessor from the railroad which was in excess of the monthly rental paid by the lessee to lessor since the receipt by El Dorado of any such excess would be the receipt of a prohibited rebate under Elkins Act.

El Dorado had argued that receipt by it from lessor of the mileage tariffs in excess of the monthly rental amount was not a rebate since the freight on the goods transported was not paid by it, but was always paid by the consignees at the

regular published freight rate. The Court rejected this argument. *El Dorado, supra*, at 22.

The consignees in *El Dorado* stand in the same position as the State of Michigan and the Federal Government in the instant case as the parties paying for the services. The railroad was the party providing the services and stands in the same position as the laboratory in this case. El Dorado occupied the position of Petitioner Golden in this case. Payment for services rendered was lawfully received by the railroad in *El Dorado* and was lawfully received by the laboratory in the instant case. In both cases payment was for services actually and legitimately rendered. The indirect payments by the railroad to El Dorado and the payments by the laboratory to Petitioner in this case were not violative or in breach of any fiduciary duty of the recipient. It is this aspect of breach of fiduciary duty, be it of a public official to his constituency or of an employee to his employer, which characterizes a kickback. See generally *US* v *Bush*, 522 F 2d 641 (7th Cir. 1975) and *US* v *George*, 477 F 2d 508 (7th Cir. 1973). A rebate, however, can consist of any discount, concession, reduction of price, or payment by a supplier of goods or services to a purchaser of goods or services. Such practices are not common-law crimes, nor are they *malim in se*. They are only prohibited where specific statutes so provide.

Both the majority of the Court of Appeals and Judge Jones, concurring, based their decision in this cause on *US* v *Hancock*, 604 F 2d 999 (7th Cir. 1978). In *Hancock*, the 7th Circuit did not deal with the question of whether the payments there received by Defendants were kickbacks or rebates as discussed above. Rather, the Seventh Circuit simply defined kickbacks as "percentage payments." Without a determination of whether Petitioner received "percentage payments," it is impossible to determine whether *Hancock* is applicable to the instant cause. The Court below refused to consider such

issue by denying Petitioner's Motion. While Petitioner urges this Court to resolve the conflict in the Circuits between *US* v *Porter*, 591 F 2d 1048 (5th Cir. 1979), and *Hancock*, and to properly differentiate between rebates and kickbacks, as well as to determine whether the Court below properly interpreted the term "furnishes" as used in § 1396h, nevertheless, it is submitted that the record in this cause does not even support a conviction under the "percentage payment" rationale of *Hancock*.

QUESTION V

Petitioner Golden alleges that the application to him of 42 USC § 1396h(b)(1) as it was framed during the period in question would result in a denial of due process for the reason that such statute did not give fair warning that it was applicable to the receipt of payments by doctor in return for referring laboratory business to a medical testing laboratory where the laboratory testing services were all performed by the medical testing laboratory and not by the referring doctor. The statute does not advise that it is the referring doctor who is deemed to *furnish* the laboratory services. Other sections of the statute indicate that it is the laboratory which furnishes such services. Criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations of due process of law. *Jordan* v *DeGeorge*, 341 US 223. Congress, in amending § 1396h in 1977, acknowledged the unclarity of the statute here asserted against Petitioner. House Report 95-393, 1977 US Code Cong. and Admin. News, 3039, at 3055-3056. It is axiomatic that a statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the due process clause of the Fifth Amendment to the United States Con-

stitution. *United States* v *Tandaric*, 152 F 2d 3 (C.C.A. Ind. 1945). While a criminal statute does not have to meet impossible standards of specificity in order to avoid being unconstitutionally vague, *United States* v *Elliot*, 266 F Supp 318 (D.C. N.Y. 1967), nevertheless it must define a crime in such a way that a man of common intelligence can understand the type of activity which is proscribed by the statute and can, thus, conduct himself within the confines of the law. *United States* v *Mandal*, 298 F Supp 1038 (D.C. N.Y. 1967). If the acts proscribed are so couched that men of common intelligence must guess at the meaning or differ as to the applicability of the statute then the statute denies due process. *United States* v *Eastern Airlines, Inc.*, 192 F Supp 187 (D.C. Fla. 1961). Indeed, the due process clause requires that criminal statutes be strictly construed against the prosecution and in favor of the defendant. *United States* v *Chappell*, 292 F Supp 494 (D.C. Cal. 1968).

The District Court in the instant case in denying Petitioner's Motion To Discuss the Information stated as follows:

> Defendant argued orally, however, that the person who furnishes the services must be the same person who received the kickback therefor, and that defendant Golden did not furnish the services connected with the alleged kickbacks. The government responded both orally and in its reply brief that a doctor furnishes services under the statute when he examines the patient and sends the test materials to the laboratory. It is clear that since federal funds would be paid out both to the treating physician and to the laboratory, the treating physician does fall under the statute, since the physician both renders services to the patient and (allegedly) received kickbacks from the laboratory. Given this

> understanding and the legislative history, it cannot be said that § 1396h is impermissively vague. See Opinion and Order Denying Defendant Golden's Motion To Dismiss Indictment and Motion To Dismiss Information.

This statement by the District Court graphically discloses the statute's lack of clarity. The Amended Follow Up Information focused upon the fact that Petitioner *obtained* labortory services. The government then argued and the District Court seems to have agreed that the relevant services "furnished" by Petitioner were those of treating his patients (although the Amended Follow-Up Information did not so allege). The majority of the Court of Appeals did not address the question of which services were furnished by Petitioner and Judge Jones, concurring, concluded that Petitioner "furnished" the laboratory services which were performed by another. To make matters worse, the District Court, in accepting Petitioner's plea did not advise him which service he was accused of furnishing, but, conversely, advised him that the government would have to prove beyond a reasonable doubt that he *obtained* services. Such advice was not even consistant with the District Court's own comments as set forth above.

It is thus apparant that at various times the Assistant United States Attorney, the District Court and the Court of Appeals have adopted different interpretations of the word "furnishes," as used in § 1396h(b)(1). These different interpretations involve a critical element of the crime sought to be charged. Such confusion was exactly the type of thing that Congress referred to in the Committee report accompanying the 1977 Amendment to § 1396h(b).

Petitioner can only wonder how he is supposed to have been able to ascertain that he would be guilty of a violation of § 1396h(b)(1) as a result of receiving payments from a clinical testing laboratory in return for referring work to such

laboratory when the United States Congress, as set forth in the House Report previously cited, and United States Attorneys across the nation have acknowledged that the language of the statute was unclear and in need of amendment in order to clarify the financial arrangements to be deemed criminal. If a statute's lack of clarity is conceded by United States Attorneys and members of Congress (many of whom are attorneys) then it cannot be said that it is sufficiently clear to non-attorneys and men of common intelligence such as Petitioner. It is not clear that § 1396h(b)(1) advises that it applies to laboratory testing services "furnished by others" under arrangements made by doctors. Internal statutory language refers to the party who performs such services as the furnisher thereof. Thus, § 1396h(b)(1) cannot be constitutionally applied to Petitioner.

Nor does § 1396h(b)(1) clearly advise Petitioner that by virtue of treating Medicaid patients, he would "furnish services" within the contemplation of the section. (Note, moreover, that the Amended Follow-Up Information did not so charge; the District Court did not so advise upon Petitioner's plea, nor the Court of Appeals so hold).

The Court below did not interpret or apply § 1396h(b)(2). Nevertheless, Petitioner must concede that such subsection is more closely applicable to the facts of this case than § 1396h(b)(1). Petitioner moved before the Court of Appeals for a rehearing upon the questions of whether the payments allegedly received by Petitioner were rebates or kickbacks and whether Congress intended to differentiate between kickbacks and rebates. Petitioner submits that such differentiation was specifically intended by Congress and that the kickback portion of the statute is not constitutionally applicable to this cause.

Rebates are payments by a supplier of service to one who orders the service, but do not involve breach of, or in-

terference with, a fiduciary relationship. Kickbacks involve such breach or interference. The instant case does not involve any such breach or interference. § 1396h(b)(1) does not advise that it is applicable to a payment arrangement which does not involve any such breach or interference. While a rebate may, in certain economic circumstances, be prohibited, it is not necessarily the legal equivalent of a kickback. § 1396h(b)(1) does not advise that payments for referral of business which do not breach or interfere with a fiduciary relationship are illegal. The section under which Petitioner is charged does, thus, fail to advise that the conduct alleged in this cause is prohibited.

CONCLUSION

Petitioner Golden submits that substantial reasons exist for granting the Writ of Certiorari prayed for in this Petition. A split in the Circuits as evidenced by the decisions of the Fifth Circuit and the Seventh Circuit must be resolved. The term "furnishes" as used in the statute can only be definitively interpreted by this Court. A determination must be made as to whether the conduct of Petitioner as charged in this case, constitutes the receipt of a rebate as opposed to a kickback and whether the amounts allegedly received by Petitioner were percentage payments as that phrase has been used by the Seventh Circuit. Finally, this Court must determine whether the statute as applied to the facts of the instant cause, is suffi-

ciently clear to put men of average intelligence on notice that it would be applicable.

Respectfully submitted,

LIPPITT, HARRISON, PERLOVE, FRIEDMAN & ZACK

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition For Writ of Certiorari was mailed to the office of FRANCIS L. ZEBOT, U.S. Attorney's Office, 839 Federal Building, Detroit, Michigan 48226, and WADE H. McCREE, JR., Solicitor General of the United States, Washington, D.C. 20530, this 17th day of October, 1980.

(s) Warren J. Perlove, Esq.

(s) Robert S. Harrison, Esq.

APPENDIX A

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

v

GERALD WEINGARDEN, D.O., DONALD FREEDLANDER, D.O., ROBERT GASH, D.O., HARVEY GOLDEN, D.O., RICHARD TAPERT, D.O., HENRY ELLIS, SANFORD HOSKOW, CHARLES SHERMETARO, MAUREEN HOSKOW, a/k/a MAUREEN A. DELANEY, J.K.F., INC., M.A. DELANEY, INC., a Michigan corporation, MEDIA TECHNOLOGY, INC., a Michigan corporation, and BERNARD LAMPEAR, Defendants	Criminal Action No. 8-80689 Harvey Golden, D.O.

Proceedings had in the above-entitled matter before HONORABLE CORNELIA G. KENNEDY, Chief Judge, United States District Court, at Detroit, Michigan, on Friday, March 9, 1979.

APPEARANCES:

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Appearing on behalf of United States of America

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Appearing on behalf of Defendants Richard Tapert and Gerald Weingarden

NEIL FINK
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(By Cynthia R. Goldfarb, Esq.)

Appearing on behalf of Defendant Donald Freedlander

THE COURT: I don't think that is quite his argument. He would concede that the statute could cover doctors if the service was rendered by the doctor. In other words, let's just take an example, if a doctor examined a patient and paid a kickback to, say, another doctor for referring the patient, I

think he would — I won't make him do this — but I think he would concede that that would come under (b).

MR. PERLOVE: I would absolutely concede that, Your Honor.

THE COURT: What I think he is arguing is that a person who furnishes the services must be the same person who solicits, offers, or receives the kickback, and that the doctor here did not — the doctors, they all join in — did not furnish the services relating to the kickbacks, at least I think that's what he is saying.

MR. PERLOVE: That's absolutely correct, Judge.

MR. PARKER: I realize that the language of the information refers to services performed by the laboratory and perhaps that's the root of the confusion, if any.

THE COURT: No, I don't think he is confused about that. He is just claiming that the doctors did not furnish any service. He is talking about the statute. He says the doctor did not furnish any service for which any kickback was paid, that the only person that furnished any services for which any kickbacks were paid was the laboratory, at least that's their argument.

MR. PARKER: I guess our position would be that a doctor furnishes services to an individual whenever he treats that individual and whenever he sends that individual's blood or whatever for testing, and so comes right under the plain language of the statute. The statute says whoever provides services to an individual. The doctors are charged with providing services to a patient and then sending, as part of those services, blood to a laboratory which is to be analyzed and which laboratory then pays a kickback to the doctor.

THE COURT: Is the Government's proof going to show that the payments for Medicaid and Medicare are made directly to the laboratory or are they made to the doctor?

MR. PARKER: They are made to both. When a doctor provides services to a patient, he then bills for his services to the Department of Social Services for Medicaid, for example.

THE COURT: Right.

MR. PARKER: And the laboratory to whom is sent specimens by the doctor, then bills for whatever work it performs.

THE COURT: It bills Medicaid directly for the work it performs?

MR. PARKER: It bills the Department of Social Services, yes.

THE COURT: And do I understand then that the Government's position is that the services, I am trying to understand, the services rendered by the doctor are the taking of the blood, for example.

MR. PARKER: The taking of what?

THE COURT: The taking of the blood.

MR. PARKER: Of the treating of the patient, one, and also of the sending of the blood to the laboratory, both of those, I think, constitute services to an individual. Perhaps sending the blood is part of the component part of the total treatment of the individual, but I think that a doctor's examination of a patient constitutes services under the misdemeanor statute.

THE COURT: Does the information cover 2(d), I mean (b)2 or (b)1 or both.

MR. PARKER: It's just (b)1. I think that's the only one that is charged.

MR. PERLOVE: That is correct.

Would the Court like this back?

APPENDIX B

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

v

GERALD WEINGARDEN, D.O., DONALD FREEDLANDER, D.O., ROBERT GASH, D.O., HARVEY GOLDEN, RICHARD TAPERT, D.O., HENRY ELLIS, SANFORD HOSKOW, CHARLES SHERMETARO, MAUREEN HOSKOW, a/k/a MAUREEN A. DELANEY, J.K.F., INC., M.A. DELANEY, INC., a Michigan Corporation, MEDIA TECHNOLOGY, INC., a Michigan corporation, and BERNARD LAMPEAR,	Criminal Action No. 8-80689
Defendants	Plea Harvey Golden, D.O.

Proceedings had in the above-entitled matter before the HONORABLE CORNELIA G. KENNEDY, Chief Judge, United States District Court, at Detroit, Michigan, on Tuesday, April 10, 1979.

APPEARANCES:

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Appearing on behalf of United States of America

ALBERT KRIEGER
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Appearing on behalf of Defendant Gerald Weingarden, D.O.

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Appearing on behalf of Defendant Donald Freedlander, D.O.

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Appearing on behalf of Defendant Richard Tapert D.O.

. . . is that correct, Mr. Rosen?

MR. ROSEN: I think that is a factually accurate statement, your Honor.

THE COURT: It is accurate that you would make that statement?

MR. ROSEN: I would make that representation, yes.

MR. HARRISON: Your Honor, I should have said Medicaid or Medicare, rather than just limiting it to Medicaid.

THE COURT: That does not change Mr. Rosen's position.

MR. ROSEN: No, it does not.

THE COURT: Now, do you understand that in order to prove you guilty of those counts the Government would have to prove beyond a reasonable doubt that on or about the dates listed below that you obtained services from Titan Laboratories for which payment was to be made in part out of federal funds under a state plan approved under the Social Security Act, Title 19, do you understand that?

DEFENDANT GOLDEN: Yes.

THE COURT: And that you solicited and/or received payments from Titan Laboratories, Inc., and Media Technology as detailed in the specific counts, some from Titan and some from Media?

DEFENDANT GOLDEN: Yes, your Honor.

THE COURT: I guess one is from Media and the balance from Titan.

And it would have to prove that you received these payments knowingly and wilfully. Do you understand that?

DEFENDANT GOLDEN: Yes.

THE COURT: And that you received them because you had — in order to prove you guilty that you received them because you had in fact referred this business to Titan Laboratories, do you understand that?

DEFENDANT GOLDEN: Yes, your Honor.

In addition to that I was also promised directorship of the laboratory which I was given.

THE COURT: Which you were or you were not given?

DEFENDANT GOLDEN: I was given.

THE COURT: You were a director then of Titan Laboratories at one time?

DEFENDANT GOLDEN: Yes.

MR. PERLOVE: Your Honor, this is not a directorship in the sense of a member of the board of directors.

MR. HARRISON: He was a laboratory director.

THE COURT: I appreciate the clarification.

MR. PERLOVE: I think it's a significant point.

THE COURT: But you never actually became a director in the sense of going there and directing their activities?

DEFENDANT GOLDEN: I performed various tasks for the laboratory, I set up their complete profiles, among other things, and I did a great deal of research as well as consulting with them.

THE COURT: Well, let me ask you, was one of the reasons, you have indicated now an additional reason for these payments in addition to referral of the business, were both of these reasons co-equal?

DEFENDANT GOLDEN: I would say so, yes.

THE COURT: The referral of business and the work that you did were co-equal reasons for the payment?

DEFENDANT GOLDEN: Yes.

THE COURT: Do I understand that you do wish to plead guilty to Counts 11 through 15?

DEFENDANT GOLDEN: Yes, your Honor.

THE COURT: You understand you have a constitutional right under the Federal Constitution to a jury trial, or if you and the Government both agree, you have a right to a trial by the Judge, and by pleading guilty you give up your constitutional right to a jury trial, indeed, your right to a trial at all, do you understand that?

DEFENDANT GOLDEN: Yes, your Honor.

THE COURT: Do you understand that at a trial you are presumed to be innocent, and that the Government would

have to prove your guilt beyond a reasonable doubt before either the Judge or the jury could find you guilty, do you understand that?

DEFENDANT GOLDEN: I understand that, your Honor.

THE COURT: Do you understand that at a trial you could testify in your own behalf, if you chose to do so, but you have a right under the Constitution to remain silent, and if you chose to remain silent the jury would be instructed, and the Court would apply the same rule of law, that no finding or inference of guilt could be held against you?

DEFENDANT GOLDEN: I understand.

THE COURT: Do you understand that at a trial you are entitled to be represented by counsel, to be confronted in open court by the witnesses against you, to have your attorney cross-examine those witnesses and have the power of the court's subpoena to secure witnesses on your own behalf, and by pleading guilty you give up all those rights?

DEFENDANT GOLDEN: I understand that, your Honor.

THE COURT: Knowing those things, how do you wish to plead at this time to Counts 11, 12, 13, 14, 15?

DEFENDANT GOLDEN: Guilty, your Honor.

THE COURT: Will you tell me in your own words what it is that you did do that causes you to plead guilty?

DEFENDANT GOLDEN: Part of my motives I stated, perhaps an equal amount of my motives were for the indicement of monetary gain.

THE COURT: In other words, to receive payment from Titan for sending work to Titan?

DEFENDANT GOLDEN: Yes.

THE COURT: And some of that work at least was Medicare and Medicaid work?

DEFENDANT GOLDEN: Yes, your Honor.

THE COURT: Would that be true for all of the periods involved here, May 27, 1974, through December 6, 1974?

DEFENDANT GOLDEN: Yes, your Honor.

THE COURT: Are there any other questions the Government would like me to ask?

MR. ROSEN: I can't think of any, your Honor.

THE COURT: And you have had plenty of time to discuss this matter with your attorney?

DEFENDANT GOLDEN: Yes, your Honor.

THE COURT: And, counsel, you have also explained to him his constitutional rights in this matter?

MR. HARRISON: Yes, we have, your Honor.

THE COURT: Once again let me explain to you, Dr. Golden, that if an appeal on the legal issues that your counsel intends to raise is unsuccessful, at least I presume he does, you understand that this is a final plea of guilty here, that there will not be a chance at that time to ask that it be set aside or do something of that nature, do you understand this is a final plea of guilty?

DEFENDANT GOLDEN: That has been explained to me.

MR. HARRISON: Your Honor, we do intend to appeal with regard to our legal disagreement . . .

APPENDIX C

Nos. 79-5222-24, 79-5269-70

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v

RICHARD TAPERT, HARVEY GOLD-GOLDEN, GERALD WEINGARDEN, DONALD FREEDLANDER and ROBERT GASH,
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed June 16, 1980.

Before: WEICK and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge, delivered the opinion of the Court, in which WEICK, Circuit Judge, joined. JONES, (pp. 18-20) filed a separate concurring opinion.

PHILLIPS, Senior Circuit Judge. These are consolidated appeals by five Detroit osteopathic physicians who were convicted of receiving kickbacks for sending urine and blood samples of their patients to Titan Laboratories (Titan) for analysis. All five of the physicians were enrolled in the Medicare and Medicaid programs and the charges for the laboratory analysis were paid to Titan out of Medicare and

Medicaid funds. The district court held that the payments violated the original version of 42 U.S.C. § 1936h(b),[1] which was in effect during the years involved in this case. In 1977 Congress amended the statute so as to remove any possible doubt that conduct such as that involved in the present case violates the Act.[2]

The principal issues on this appeal are whether the information under which appellants were convicted charges a violation of the pre-1977 version of 42 U.S.C. § 1396h(b)(1) (note one), and whether the statute is unconstitutional for vagueness. Then Chief District Judge Cornelia Kennedy, now a judge of this court, ruled that the payments to the doctors were kickbacks, that the information charges a violation of the statute and that the statute is not invalid for vagueness. We affirm.

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[1] (b) Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this title [42 USCS §§ 1396-1396d, 1396f-1396i] and who solicits, offers, or receives any —

(1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, or

(2) rebate of any fee or charge for referring any such individual to another person for the furnishing of such items or services

shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

[2] The amended § 1396h(b) (1) is as follows:

(b) (1) Whoever solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind —

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for

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Apparently Titan initiated the arrangement for the kickbacks, by having its representative contact one of the

which payment may be made in whole or in part under this subchapter, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under this subchapter,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) Whoever offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person —

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this subchapter, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under this subchapter,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(3) Paragraphs (1) and (2) shall not apply to —

(A) a discount or other reduction in price obtained by a provider of services or other entity under this subchapter if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under this subchapter; and

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services.

physicians.[3] In return for payments from Titan or one of its affiliates, the physician agreed to send his patients' specimens to Titan and to encourage his colleagues to do the same. Other physicians entered into similar agreements, which Titan described as "consulting" arrangements. This pattern of activity began in April 1974 and continued until January 1978.

Beginning in 1976, the physicians began depositing their Titan checks in an escrow fund for the purpose of acquiring an interest in Titan. The fund was administered by J.K.F. Inc., a corporation set up by the physicians to hold the Titan stock they proposed to buy. When the escrow fund reached $60,000, the physicians contributed an additional $15,000 and J.K.F. Inc. acquired a 40 per cent interest in Titan.

On September 21, 1978, a federal grand jury returned a 37 count indictment against appellants, five other individuals and three Michigan corporations. On February 2, 1979, the Government filed a 42 count follow-up information charging appellants with soliciting and receiving Medicare and Medicaid kickbacks from Titan and associated entities. The information thereafter was amended. The version under which appellants were convicted is referred to in the record as the Amended Follow-Up Information.

Judge Kennedy denied the motions of appellants to dismiss the indictments. Thereafter, in a published opinion, she denied their motions for a rehearing. *United States* v. *Weingarden*, 468 F.Supp. 410 (E.D. Mich. 1979). In this opinion Judge Kennedy held that the pre-1977 version 42 U.S.C. §

[3] *See United States* v. *Shermetaro*, ____ F.2d ____ (No. 79-5148, 6th Cir. 1980), in which this court affirmed the conviction of one of the parties to this scheme under 18 U.S.C. § 371 for conspiracy to defraud the United States by obstructing the collection of income taxes from Titan Laboratories.

1396h(b)(1) prohibited the conduct charged in the information, and that the challenged statute was sufficiently clear to given to appellants adequate notice that their alleged conduct was illegal.

Thereafter, under a plea bargaining agreement, each of the appellants entered a plea of guilty to certain counts of the information applicable to him. The Government approved dismissal of the indictment.

II

Prior to their guilty pleas, the appellants gave notice that they intended to appeal the ruling of the district court on the applicability of § 1396h(b)(1). To preserve the issue for appeal, they moved for arrest of judgment under Fed. R. Crim. P. 34 on the ground that the statute did not apply to their conduct and the district court, therefore, had no jurisdiction to accept their guilty pleas. This is the procedure approved by this court in *United States* v. *Heller*, 579 F.2d 990, 992-93, and n. 1 (6th Cir. 1978). *See also North Carolina* v. *Alford*, 400 U.S. 25, 37-38 (1970); *United States* v. *Cox*, 464 F.2d 927, 941 (6th Cir. 1972). The Government concedes that the alleged defects raised by appellants are jurisdictional and not waived by their guilty pleas. Consequently the legal issue is properly before this court.

III

Dr. Gerald Weingarden entered a plea of guilty to Counts three through seven of the amended follow-up information, which are as follows:

> On or about the dates listed below, in the Eastern District of Michigan, Gerald Weingarden, D.O., having obtained services from Titan Laboratories, Inc., for

which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., Spartan Laboratories, Inc., and M. A. Delaney, Inc., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.

To wit, the Government contends Gerald Weingarden, received monetary payments labelled "consulting fees" from an entity related to Titan Laboratories, Inc., namely Spartan Laboratories, Inc., principally to induce the defendant to send his laboratory work to Titan. In addition, it was agreed that the defendant would perform the following services: (1) to form and assist in the formation of J.K.F., Inc., as described in indictment Number 78-80689, and (2) to encourage other doctors to send their laboratory work to Titan, as described in Indictment Number 78-80689.

Gerald Weingarden visited Titan Laboratories, Inc., from time to time, in connection with the performance of the above-described services.

The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations, and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., was entitled. That is, when Titan Laboratories, Inc., was asking for payment for specific blood work, that blood work had been done, and that the billing for that blood work was in accordance with medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
3	October 27, 1976	$1,000	Spartan Laboratories, Inc.
4	November 22, 1976	$1,000	Spartan Laboratories, Inc.
5	December 28, 1976	$1,000	Spartan Laboratories, Inc.
6	March 1, 1977	$1,000	Spartan Laboratories, Inc.
7	March 1, 1977	$1,000	Spartan Laboratories, Inc.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Weingarden admitted that he had committed the acts charged in the information.

Dr. Harvey Golden entered a plea of guilty to counts 11 through 15 of the Information, which charged as follows:

> On or about the dates listed below, in the Eastern District of Michigan, Harvey Golden, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., and Media Technology, Inc., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.
>
> To wit, Harvey O. Golden D.O., received monetary payments from Titan Laboratories, Inc., in exchange for referring his laboratory work to Titan Laboratories, Inc. The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations, and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., were entitled. That is, when Titan Laboratories, Inc., was asking for payment for specific blood work, that blood

work had been done, and that the billing for blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
11	May 27, 1974	$ 850	Titan Laboratories, Inc.
12	August 8, 1974	$ 900	Media Technology, Inc.
13	September 3, 1974	$1,500	Titan Laboratories, Inc.
14	October 24, 1974	$1,000	Titan Laboratories, Inc.
15	December 6, 1974	$1,500	Titan Laboratories, Inc.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Golden testified as follows:

THE COURT: Knowing those things, how do you wish to plead at this time to Counts 11, 12, 13, 14, 15?

DEFENDANT GOLDEN: Guilty, your Honor.

THE COURT: Will you tell me in your own words what it is that you did do that causes you to plead guilty?

DEFENDANT GOLDEN: Part of my motives I stated, perhaps an equal amount of my motives were for the inducement of monetary gain.

THE COURT: In other words, to receive payment from Titan for sending work to Titan?

DEFENDANT GOLDEN: Yes.

THE COURT: And some of that work at least was Medicare and Medicaid work?

DEFENDANT GOLDEN: Yes, your Honor.

THE COURT: Would that be true for all of the periods involved here, May 27, 1974, through December 6, 1974?

DEFENDANT GOLDEN: Yes, your Honor.

Dr. Donald Freedlander entered a plea of guilty to counts 17 through 21 of the Information, which charged as follows:

On or about the dates listed below, in the Eastern District of Michigan, Donald Freedlander, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., and M. A. Delaney, Inc., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.

To wit, the Government contends Donald Freedlander, D.O., received monetary payments from an entity related to Titan Laboratories, Inc., namely M. A. Delaney, Inc., principally to induce Donald Freedlander, D.O., to send his laboratory work to Titan Laboratories, Inc. In addition, it was agreed that Donald Freedlander would perform the following services:

(1) to form and assist in the formation of J.K.F., Inc., as described in Indictment Number 78-80689, and (2) to encourage other doctors to send their laboratory work to Titan Laboratories, Inc., as described in Indictment Number 78-80689.

The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations, and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., were entitled.

That is, when Titan Laboratories, Inc., was asking for payment for specific blood work, that blood work had been done, and that the billing for that blood work was in accordance with Medicaid statues and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
17	August 23, 1976	$200	M. A. Delaney, Inc.
18	August 23, 1976	$200	M. A. Delaney, Inc.
19	September 7, 1976	$200	M. A. Delaney, Inc.
20	September 10, 1976	$200	M. A. Delaney, Inc.
21	September 15, 1976	$200	M. A. Delaney, Inc.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Freedlander testified as follows:

> THE COURT: Will you tell me what it was that you did on or about the dates mentioned that causes you to plead guilty? What did you do on or about August 23rd, 1976, with regard to these checks apparently from M. A. Delaney, Inc.?
>
> DEFENDANT FREEDLANDER: These checks were received by me, yes, your Honor, they were received by me.
>
> THE COURT: You received the checks described in Counts 17, 18, 19, 20, 21?
>
> DEFENDANT FREEDLANDER: Yes, I did, your Honor.
>
> THE COURT: From M. A. Delaney?
>
> DEFENDANT FREEDLANDER: Yes, I did.
>
> THE COURT: And did you have some relationship at least with Titan Laboratories as stated in the information?
>
> DEFENDANT FREEDLANDER: Yes, I did, your Honor.
>
> THE COURT: And did that include some kind of business involving Medicare and Medicaid?
>
> DEFENDANT FREEDLANDER: Right.
>
> THE COURT: In other words, this was business

with Titan Laboratories that included some business relating to Medicare and Medicaid samples?

DEFENDANT FREEDLANDER: Yes, your Honor.

THE COURT: Did you receive these payments for sending work to Titan Laboratories?

DEFENDANT FREEDLANDER: Yes, I did, your Honor.

THE COURT: Did you perform any services for these companies, M. A. Delaney and Titan Lab?

DEFENDANT FREEDLANDER: Yes, I did, your Honor, I helped with the formation and was of assistance to the J.K.F. Corporation.

* * *

THE COURT: You have said something about, among other things, and that was kind of confusing to me, except for setting up J.K.F. Corporation, did you provide any other services to Titan Laboratories?

DEFENDANT FREEDLANDER: Yes, among other things, I encouraged other physicians to send their work to the laboratory.

THE COURT: In other words, there may not be a factual basis for this plea other than the statement that you in fact performed services besides sending business to Titan Lab?

MR. FINK: I think under the general intent statute, I don't think there has to be a dominant purpose, your Honor. He has indicated that that was one of the things he received consideration for.

THE COURT: As long as it is clear, and I am not so sure it is clear from the statement, was one of the reasons that you received these payments from Titan Lab, or from M. A. Delaney, Inc., because you were sending your lab business to Titan Laboratories, was that one of the reasons?

DEFENDANT FREEDLANDER: In the total, yes, it was. It was part of it. It was one of the reasons.

* * *

THE COURT: In view of the fact it uses the word wilfully and that there were other considerations, I think we should at least really know what he does wish to plead guilty. I have a little problem with the factual basis under his statement. Maybe I can ask him this question.

Was the referral of business to Titan Laboratories a substantial or significant reason?

DR. FREEDLANDER: They were among the reasons, you know, a combination as to the rest of it, why, I received the compensation, yes, your Honor.

THE COURT: I am still trying to find out if it was significant at all or was it just minor?

DEFENDANT FREEDLANDER: Well, when I say significant, your Honor, there are several components involved. Is this more strongly than this one or that one, as the case may be, as I say, I did give my blood work to the laboratory, I did help assist them, I did help in getting other doctors referred to them, and with the combination of everything I don't know where to put the weight on each one as to compensation, but all were done by me, that is true, and I did receive the compensation.

MR. FINK: Your Honor, the 1952 cases that you are familiar with, the Interstate travel in aid of racketeering cases, which are specific intent crimes, which I don't think this is, do not require the dominant purpose to be the travel, it can be a co-equal purpose.

THE COURT: Is he going to say it was co-equal with the other things?

DEFENDANT FREEDLANDER: With the other things, yes.

* * *

THE COURT: As long as we get something that was co-equal with other services of recruiting doctors and helping to form this other corporation, the three of them would be co-equal?

DEFENDANT FREEDLANDER: Yes, your Honor.

THE COURT: I think that that is sufficient for that.

* * *

THE COURT: I think I should ascertain that.

Did you, in fact, submit blood samples to Titan Laboratories?

DEFENDANT FREEDLANDER: That I did, your Honor.

THE COURT: And they were from Medicare and Medicaid patients?

DEFENDANT FREEDLANDER: Yes, they were.

MR. ROSEN: That's sufficient.

THE COURT: I think I asked that but maybe not so directly.

MR. ROSEN: I have nothing further.

THE COURT: And that was during the time period of these checks that were received from M. A. Delaney?

DEFENDANT FREEDLANDER: Yes, they were, your Honor.

THE COURT: And the payments from M. A. Delaney were for the three purposes: One because you sent your lab work to Titan; two, because they indicated tests; and, three, you were supplying other doctors to send their work to J.K.F. and/or others?

DEFENDANT FREEDLANDER: Yes, your Honor.

THE COURT: And you did what you did knowingly?

DEFENDANT FREEDLANDER: Yes, I did, your Honor.

THE COURT: Having discussed these matters this afternoon, do you still wish to plead guilty to Counts 17, 18, 19, 20 and 21?

DEFENDANT FREEDLANDER: Yes, I do.

Dr. Richard Tapert entered a plea of guilty to counts 27 through 31 of the Information, which charged as follows:

> On or about the dates listed below, in the Eastern District of Michigan, Richard Tapert, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and receive kickback payments from Titan Laboratories, Inc., and Associated Physicians Services Co., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.
>
> To wit, Richard Tapert, D.O., received monetary payments from an entity related to Titan Laboratories, Inc., namely Associated Physicians Services Company, in exchange for referring his laboratory work to Titan Laboratories, Inc. The claims filed by Titan Laboratories, Inc., were in accordance with the Medicaid statutes and regulations and the monies received by Titan Laboratories, Inc., were those to which Titan Laboratories, Inc., was entitled. That is, when Titan Laboratories, was asking for payment for specific blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
27	June 24, 1975	$200	Associated Physicians Services, Co.
28	August 12, 1975	$200	Associated Physicians Services, Co.
29	September 9, 1975	$500	Associated Physicians Services, Co.
30	October 17, 1975	$200	Associated Physicians Services, Co.
31	December 10, 1975	$200	Associated Physicians Services, Co.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

At his Rule 11 sentencing hearing, Dr. Tapert testified as follows:

THE COURT: How do you plead to counts 27 through 31?

THE DEFENDANT: I plead guilty.

THE COURT: Will you tell me what it was that you did do that causes you to plead guilty to those counts?

THE DEFENDANT: I accepted monetary payments from Associated Physicians Service Company in exchange for referring my laboratory work to Titan Laboratory.

THE COURT: And did you do that knowingly?

THE DEFENDANT: Yes, I did.

THE COURT: Are there any other questions the Government would like me to ask?

MR. ROSEN: Maybe your Honor could inquire as to the taking of blood samples from Medicare-Medicaid patients.

THE COURT: Yes, during this period of time that these payments were made, was some of the work that you were referring to Titan Laboratory or Associated Physicians Medicare and Medicaid work?

THE DEFENDANT: Yes.

THE COURT: For Medicare and Medicaid patients?

THE DEFENDANT: That is correct.

THE COURT: And would that be true during the period of each of these payments?

THE DEFENDANT: Yes.

THE COURT: Any other questions, Mr. Rosen.

MR. ROSEN: No, your Honor.

THE COURT:Have you had plenty of time to discuss this matter with your attorney?

THE DEFENDANT: Yes, I have.

THE COURT: And he has explained to you what it is the Government has to prove to prove you guilty?

THE DEFENDANT: Yes.

THE COURT: And you understand also that this is a final disposition insofar as this Court is concerned, that this plea of guilty, if the Court accepts it, it will not set aside the plea of guilty should an appeal be unsuccessful on the legal issues, do you understand?

THE DEFENDANT: I understand.

THE COURT: Having discussed these matters this afternoon, do you still wish to plead guilty to these counts?

THE DEFENDANT: Yes, I do.

Dr. Robert Gash entered a plea of guilty to county 36 of the Information, which charged as follows:

> On or about the dates listed below, in the Eastern District of Michigan, Robert Gash, D.O., having obtained services from Titan Laboratories, Inc., for which payment was to be made in part out of federal funds under a state plan approved under Title XIX of the Social Security Act, did knowingly and wilfully solicit and

receive kickback payments from Titan Laboratories, Inc., and Associated Physicians Services, Co., as detailed below in connection with the furnishing of the aforesaid services, each payment being a separate count of this indictment.

To wit, Robert Gash, D.O., received monetary payments from an entity related to Titan Laboratories, Inc., namely Associated Physicians Services Company, in exchange for referring his laboratory work to Titan Laboratories, Inc. The claims filed by Titan were in accordance with the Medicaid statutes and regulations and the monies received by Titan Laboratories, Inc., was entitled. That is, when Titan Laboratories, Inc., was asking for payment for specific blood work was in accordance with Medicaid statutes and regulations.

Count	Approximate Date of Payment	Amount of Money	Source of Payment
36	August 11, 1975	$200	Associated Physicians Services, Co.

All in violation of Title 42, U.S.C., Section 1396h(b)(1).

In his Rule 11 sentencing hearing, Dr. Gash testified as follows:

THE COURT: Will you tell me what you did on or about August 11, 1975 that causes you to plead guilty?

DEFENDANT GASH: On or about August 11, 1975, I received a check for $200.00 from Associated Physicians Services, Inc., for submission of lab work to Titan Laboratories.

THE COURT: To Titan Laboratories?

DEFENDANT GASH: Yes.

THE COURT: And was some of that lab work at least lab work under both Medicare and Medicaid?

DEFENDANT GASH: I would have to assume so. I really don't know that, your Honor.

THE COURT: But ordinarily there would be some within the work that you would submit within a month?

DEFENDANT GASH: I would say so, yes.

THE COURT: Does the Government have some evidence that some of this was?

MR. ROSEN: Yes, it does, your Honor.

THE COURT: Are there any other questions you would like to ask?

MR. ROSEN: No, your Honor.

THE COURT: Having discussed this matter this afternoon, do you still wish to plead guilty to Count 36?

DEFENDANT GASH: Yes, your Honor.

IV

In asserting that the statute was not sufficiently broad prior to the 1977 amendment to make their activities a criminal offense, and that the statute under which they were convicted is invalid for vagueness, appellants rely strongly upon the fact that Congress found it necessary to enact the 1977 amendment.

An amendment to an existing statute is not an acknowledgment by Congress that the original statute is invalid. It is a common and customary legislative procedure to enact amendments strengthening and clarifying existing laws.

The report of the House Committee on Ways and Means contains the following statement on the purpose of the 1977 amendment:

> Your committee bill would modify the penalty provisions *in existing law* which relate to those persons providing services under medicare and medicaid.

Existing law provides specific penalties under the medicare and medicaid programs for certain practices that long have been regarded by professional organizations as unethical, which are unlawful in some jurisdictions, and which contribute significantly to cost of the programs. Such practices as the submission of false claims, or the soliciting, offering, or *acceptance of kickbacks* or bribes, *including rebates or [sic] a portion of fees or charges for patient referrals, are misdemeanors under present law* . . .

Recent hearing and reports, however, indicate that such penalties have not proved adequate deterrents against illegal practices by some individuals who provide services under medicare and medicaid. In addition, these misdemeanor penalties appear inconsistent with existing Federal criminal code sanctions which make similar actions punishable as felonies. Also, it has been brought to the attention of the committee by the U.S. Attorney's offices which have utilized these Social Security Act sanctions in the prosecution of medicare and medicaid fraud cases that the existing language of these penalty statutes is unclear and needs clarification.

Your committee's bill would strengthen the penalty provisions *in existing law* which relate to persons providing services under medicare and medicaid . . .

In addition, the bill would *clarify and restructure* those *provisions in existing law* which define the types of financial arrangements and conduct to be classified as illegal under medicare and medicaid. (Emphasis added.) H.R. Rep. No. 95-393 (II), 95th Cong., 1st Sess. *reprinted in* (1977) U.S. Code Cong. & Ad. News 3039, 3055.

We agree with the definition of "kickbacks" adopted and applied by the Seventh Circuit in *United States* v. *Hancock*, 604 F.2d 699 (7th Cir. 1978). We follow that decision in affirming the decision of the district court that appellants have entered pleas of guilty under an Information charging them with violations of a valid statute which made their conduct a criminal offense. The record demonstrates to our satisfaction that the payments which the appellants admitted receiving were "kickbacks" within the meaning of the statute.

We choose to follow the Seventh Circuit in *Hancock*, rather than *United States* v. *Porter*, 591 F.2d 1048 (5th Cir. 1979). The reasons for this conclusion are stated well by Judge Kennedy in her published opinion. 468 F.Supp. at 412-15.

Appellants contend that they did not "furnish" the services in connection with which they received payments, and that the Information does not charge an offense. These and all other contentions made by appellants have been considered and found to be without merit.

The convictions are affirmed.

JONES, Circuit Judge, concurring. I agree that the term "kickback" should be defined to include "a percentage payment for granting assistance by one in a position to open up or control a source of income." *United States* v. *Hancock*, 604 F.2d 999, 1002 (7th Cir. 1978). The United States has an important interest in securing the honest administration of federally funded programs. *United States* v. *Thompson*, 366 F.2d 167 (6th Cir.), *cert. denied*, 385 U.S. 973 (1966). I write separately to discuss a substantial issue of first impression concerning the construction of 42 U.S.C. § 1396h (b) (1) (1972): Is a physician, who provides services to medicaid patients and who receives illegal kickbacks from laboratories for the referral of those patients, for which referrals federal funds do not reimburse the doctor or the laboratory, a person who *"fur-*

nishes items or services to an individual *for which* payment is or may be made in whole or part out of Federal funds . . . *and* who . . . receives any (1) kickback . . . *in connection* with the furnishing of *such* items or services . . .?" I concur with the majority's affirmative answer.

The language of the amended informtions and the guilty pleas, as thoroughly reported in the majority opinion, define the facts of the case.[1] The defendants were charged with and pleaded guilty to receiving payments in various forms from a laboratory for patient referrals. The informations allege that the defendants "obtained services" from a laboratory, for which services medicaid would pay in part, and that the defendants received kickbacks in connection with these services. Consequently, the relevant services for which federal funds were paid are the tests performed by the laboratory. The record also establishes that the defendants were reimbursed by medicaid for their treatment of the same patients referred to the laboratories.

The facts raise two questions of statutory interpretation: 1) did the physicians "furnish" the laboratory services; and 2) were the kickbacks paid "in connection with" the laboratory services rather than just the patient referrals? Defendants

[1] According to my construction of § 1396h (b) (1), the amended informations do state an offense. In his zeal to uphold the guilty pleas, the Assistant United States Attorney argued seriously that this Court should consider the amended informations to have been informally amended by oral argument and by his response to the defendants' motion to dismiss the informations. Further, he contended that the district court had *implicitly* granted leave for this informal second amendment. The Government's position is not supported in the record and is an attempt to play "fast and loose" with the established rules of criminal procedure and principles of due process. Such overly zealous advocacy should be tempered. In other respects, the Assistant United States Attorney prepared a fine brief.

argue that they did not "furnish" the laboratory services, since the laboratory actually performed the tests. They point out that their services were reimbursed separately from the laboratory tests. Second, they argue that the kickbacks were paid "in connection with" the patient referrals rather than any service for which medicaid funds were paid. They declare that the kickbacks did not affect their treatment of patients or the laboratory's performance of tests.

It is fair to say that physicians in Michigan in 1976-1977 furnished the laboratory services to their patients. The physicians took the specimens and sent them to a laboratory. A laboratory could act only on orders from the physicians. Mich. Comp. Laws Ann. §§ 325.81(b), 325.89(b), repealed by Mich. Comp. Laws Ann. § 333.20501 *et seq.* (1978); *cf.* 42 C.F.R. § 405.1316(e) (Medicare regulations). The laboratory could report the test results only to the physicians, unless they instructed otherwise. Mich. Adm. Code R. 325.2353(2) (Rule 53); *cf.* 42 C.F.R. § 405.1316(g) (Medicare regulations). The physicians bore the responsibility of interpreting the test data. In short, the physicians did everything but actually perform the clinical tests. Under these circumstances, by interpreting the word "furnish" according to its common usage to mean "supply or provide", I would hold that the physicians did "furnish" the laboratory services.

The physicians received the kickbacks "in connection with" the laboratory services. The statute is satisfied if there is a logical relationship between the kickbacks and the services for which federal funds were paid. In our case, the kickbacks were an agreed part of the performance of the laboratory services. The relationship between the physicians and the laboratory was formed around the payment of the kickbacks. The physicians chose to refer patients to a specific laboratory because of the negotiated kickback payments. The phrase "in

connection with" has a sufficiently broad meaning in common parlance to conclude that the kickbacks were received "in connection with" the laboratory services.

The legislative history bolsters my interpretation of § 1396h (b) (1) as enacted in 1972. Congress intended to prohibit in the administration of the Medicaid program any practices which were unethical or were proscribed by state law. H. R. Rep. No. 92-231, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4989, 5007, 5093, 5308. The physicians' receipt of kickbacks for patient referrals to the laboratory is forbidden by both Section 21 of the Code of Ethics of the Michigan Association of Osteopathic Physicians and Surgeons and by state statute, Mich. Comp. Laws Ann § 445.162. Similarly, a laboratory is prohibited from soliciting business by paying kickbacks. Mich. Comp. Laws Ann. § 333.20525(c) 1978). Since the language of the statute permits, § 1396h (b) (1) should be interpreted to effectuate congressional intent. *Barrett* v. *United States*, 423 U.S. 212 (1976); *United States* v. *Tarter*, 522 F.2d 520 (6th Cir. 1975). The ordinary meaning of the statutory language and the 1972 legislative history compel the conclusion that the physicians' receipt of kickbacks under the circumstances in this case is a violation of § 1396h (b) (1).

Finally, because the ordinary meaning of the plain language of § 1396h (b) (1) would have notified the defendants that their conduct was unlawful, the statute is not unconstitutionally vague. *United States* v. *Hancock*, 604 F.2d at 1002.

Accordingly, I concur with the opinion and judgment of the majority.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v

RICHARD TAPERT, HARVEY GOLDEN, GERALD WEINGARDEN, DONALD FREEDLANDER, AND ROBERT GAST,
Defendant-Appellants.

Nos.
79-5222-24
79-5269-70

MOTION TO STRIKE OR AMEND FOOTNOTE ONE IN CONCURRING OPINION

NOW COMES the United States of America, by and through its attorney, James K. Robinson, United States Attorney, Eastern District of Michigan, and respectfully requests that footnote one of the concurring opinion in this case be striken or amended for the following reasons:

1. The defendants in this case, under terms of a plea bargain, pled guilty to various counts of receiving Medicaid kickbacks from Titan Laboratories for referral of blood work. In addition to making arguments on the meaning of "kickbacks" and on other matters of statutory interpretation, the defendants also contended on appeal that even if the Government's statutory interpretation was accepted, the information still failed to state an offense.

The Government responded on this last argument with two alternative arguments: 1) that the information implicitly alleged that the kickbacks were received by the defendants in connection with their furnishing to their Medicaid patients blood testing services performed by the lab (Argument IV-A of Government's Brief); or 2) that the information was informally amended to embrace a second means of violating the statute in that the kickbacks were received by the defendants in connection with their furnishing treatment services to Medicaid patients separate from but related to the blood testing services performed by the lab (Argument IV-B of Government's Brief).

The Court's opinion affirming the convictions stated simply that the defense contention that the information did not charge an offense was "considered and found to be without merit." Slip op. at 17. Thus it is not clear whether the majority accepted Argument IV-A, Argument IV-B or both.

The text and footnote one of the concurring opinion make it apparent, however, that the concurring opinion accepted Government's Argument IV-A and rejected Government's Argument IV-B.

This motion addresses itself solely to the manner in which the concurring opinion rejected Government's Argument IV-B.

2. Footnote one of the concurring opinion states:

> 1. According to my construction of § 1396h(b)(1), the amended informations do state an offense, In his zeal to uphold the guilty pleas, the Assistant United States Attorney argued seriously that this Court should consider the amended informations to have been informally amended by oral argument and by his response to the defendants' motion to

> dismiss the informations. Further, he contended that the district court had *implicitly* granted leave for this informal second amendment. The Government's position is not supported in the record and is an attempt to play "fast and loose" with the established rules of criminal procedure and principles of due process. Such overly zealous advocacy should be tempered. In other respects, the Assistant United States Attorney prepared a fine brief.

3. The Government respectfully suggests that the characterization of the Government's argument as "not supported in the record" and as "an attempt to play 'fast and loose' with the established rules of criminal procedure and principles of due process" as well as constituting "overly zealous advocacy" is an unfair criticism of the Government's argument and that publication of this criticism in the permanent reports of the Sixth Circuit would do an injustice to the office of the United States Attorney for the Eastern District of Michigan and to the Assistant United States Attorney who handled the appeal in this case.

4. Assistant United States Attorney Francis Zebot, appellate counsel for the Government in this case, presented Argument IV-B in good faith. Even in the wake of the criticism in footnote one of the concurring opinion, he believes that the argument was appropriate and that advancing it was consistent with his obligation under Canon 7 of the Code of Professional Responsibility: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." (See Zebot Affidavit, attached hereto.)

5. In Argument IV-B, Mr. Zebot quoted precise language in the Government's response to defendant Golden's motion to dismiss and precise language in oral argument on that motion upon which he was relying to argue for informal

amendment of the information. *See* Government's Brief, pp. 67-69. He likewise quoted precise language from Judge Kennedy's Opinion and Order denying defendant Golden's motion to dismiss upon which he relied. *See* Government's Brief, pp. 70-71. The relied-upon language of Government trial counsel and Judge Kennedy does indeed refer to doctors' treatment services to Medicaid patients separate from blood testing services. Yet footnote one asserts that appellate government counsel's position is "not supported by the record."

6. Not only did Mr. Zebot set out clearly the language upon which he relied for informal amendment and informal leave to amend, but stressed certain factors which might lead the court to be receptive to such informal amendment in the circumstances of this case (*i.e.*, the virtual assurance of some reimbursable Medicaid treatment service by the defendants on a patient related to the blood work whenever there is a reimbursable Medicaid blood testing service by the lab; failure of the defense to object to the information on this specific ground before pleading guilty when the Government and court treated the information as if it embraced treatment services to patients; harmless error because of actual notice; the context of a bargained guilty plea (this factor was added at oral argument)).

7. Mr. Justice Sutherland In *Berger v. United States,* 295 U.S. 88 (1935) said:

> The United States Attorney is a representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the

> twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

8. Representing the government with "earnestness and vigor" certainly includes making good faith appellate arguments in an effort to sustain a criminal conviction. Ethical Consideration 7-4 regarding Canon 7 of the Code of Professional Responsibility states:

> The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

9. Appellate courts are, of course, free to reject appellate arguments of counsel, as the concurring opinion does with respect to Argument IV-B. We disagree, however, that it was improper even to advance the argument and we believe that the position asserted was not "frivolous." Surely the appellate adversary system is better served by a climate which encourages counsel to make all good faith arguments in support of his or her client's cause.

10. Mr. Zebot has the reputation both in this office and the local legal community as a competent and cautious attorney

who attempts to seek justice within proper bounds. Prior to joining our office, Mr. Zebot served for several years with the office of the Michigan State Appellate Defender where he represented many indigent defendants in criminal appeals.

11. Mr. Zebot labored painstakingly to produce the brief in this case. To charge that he has made an argument not supported by the record and to accuse him of playing "fast and loose" with the law in the permanent published reports of the Sixth Circuit would unjustly blemish an otherwise excellent record.

12. The concurring opinion's rejection of Argument IV-B certainly can be accomplished without calling Mr. Zebot's integrity into question.

WHEREFORE, for all the foregoing reasons, the Government respectfully requests that footnote one of the concurring opinion be struck or amended.

Respectfully submitted,

JAMES K. ROBINSON
United States Attorney

Dated: July 10, 1980.

APPENDIX E

Nos. 79-5222, 79-5223,
79-5224, 79-5269
and 79-5270

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Filed July 29, 1980)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v

ORDER

RICHARD E. TAPERT, D.O., HARVEY GOLDEN, D.O., GERALD WEINGARDEN, DONALD FREEDLANDER and ROBERT GASH,
Defendants-Appellants.

Upon consideration of the motion of appellee to strike or amend footnote one in the concurring opinion in the above-styled cases,

It is ORDERED that the motion be and it hereby is denied.

ENTERED BY ORDER OF THE COURT.
(s) JOHN P. HEHMAN, Clerk

see

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